No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE FOR NATIONAL RAILROAD PASSENGER CORPORATION AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether an agency charged with maintaining railroad safety and investigating railroad accidents can, consistently with the Fourth Amendment, establish by regulation a program under which operating railroad employees are subject to warrantless alcohol and drug tests following their involvement in significant accidents or "human factor" rule violations?

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This brief is filed on behalf of the National Railroad Passenger Corporation and the Association of American Railroads, as amici curiae, in support of the petition for certiorari.[1]

INTERESTS OF THE AMICI

The National Railroad Passenger Corporation ("Amtrak") manages the country's intercity rail passenger system. Amtrak operates trains in 43 states over a 24,000

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[1] Consents from counsel for the parties have been filed with the Clerk of this Court.

mile network of track (most of which is owned and also used by freight railroads) with a workforce of some 22,000 employees. The Association of American Railroads ("AAR") is a trade association representing the nation's freight railroads, and has long studied and represented the industry on such matters as railroad operations, maintenance, and safety.

The Ninth Circuit's decision below—invalidating Federal Railroad Administration regulations which established a carefully focused program of alcohol and drug testing of railroad employees involved in certain serious accidents and human factor rule violations—is of grave concern to Amtrak and AAR. For more than two years, the present litigation has chilled implementation of the regulations, and by extension, slowed efforts by some railroads to promote additional measures to further curtail alcohol and drug use within the industry. Yet alcohol and drug-related accidents continue to occur, some involving passenger fatalities, many involving employee fatalities, and some imperiling entire communities by release of hazardous cargos.

The most tragic accident in recent memory, which resulted in 16 deaths and scores of injuries, occurred near Chase, Maryland on January 4, 1987. The two crewmen responsible for that accident tested positive for marijuana and one had traces of the hallucinogenic drug PCP in his urine. Significantly, the involvement of drugs in that accident would have gone undetected were it not for the post-accident testing performed pursuant to the FRA regulations. Since January 1987 alone, there have been 41 railroad accidents, involving 29 deaths, 341 injuries, and $28 million in property damages, in which one or more of the train operators were impaired by alcohol or drugs. Over five percent of employees undergoing post-accident testing tested positive.[2] Derailments of trains

[2] *Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Committee on Commerce, Science and Transportation*, 100th Cong., 2d Sess. at 50-51 (1988) (Statement of John H. Riley, FRA Administrator).

in at least five states during 1987 caused evacuation of over 22,200 persons from their homes.[3]

As responsible employers, passenger carriers, and industry spokesmen, amici believe that all reasonable steps must be taken to prevent these tragedies. The amici recognize that—despite useful innovations such as employee assistance programs (which amici wholeheartedly support)—there are practical limits to what railroad management can do, without toxicological testing, to address the substance abuse problem. By necessity, railroad employees operate in far-flung locations and around the clock. Visual monitoring of employee performance is not always possible, at least for major railroads; and impairment, especially when drug use is involved, is often difficult to identify except in the most egregious cases.

Each railroad has for many years had rules prohibiting employees' use of or impairment by alcohol in connection with performance of their jobs. In recent years, those rules have generally been modified to include specifically a similar prohibition with respect to drugs. Railroads have used a variety of methods for monitoring employee conduct and enforcing the rules, with increasing emphasis on certain forms of toxicological testing. In adopting its regulations after a rulemaking proceeding of more than two years' duration, which was itself preceded by several years of analysis and discussion, the FRA determined that industry-wide toxicological testing is essential to deal with the current substance abuse problem.

The FRA regulations provide a significant tool for identifying those employees who use alcohol or drugs while performing functions associated with train opera-

[3] *See* Associated Press, December 13, 1987, July 22, 1987, May 6, 1987; United Press International, February 2, 1987, January 6, 1987.

tions. By holding these regulations invalid in this case, the Ninth Circuit has seriously impaired efforts to prevent senseless fatalities, injuries, and property damage in the railroad industry.[4] Amici thus have a direct and immediate interest in urging the Court to hear this case.

STATEMENT

Acting pursuant to its statutory role of overseeing railroad safety, the Federal Railroad Administration ("FRA"), after thorough investigation,[5] determined that alcohol and drug use by railroad personnel is a proven cause of a significant number of recent, avoidable railroad accidents and fatalities.[6] The agency also reasonably

[4] Railroad companies operating in the Ninth Circuit find themselves particularly disabled from addressing substance abuse by employees. Not only has the Court of Appeals there invalidated the FRA's regulations in the opinion presently at issue, it has also, in an opinion totally at odds with a prior Eighth Circuit decision, held that its Fourth Amendment analysis is determinative of the *contractual expectations* of parties to *pre-existing* collective bargaining agreements, effectively prohibiting railroads from instituting substance abuse programs independently. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631 (April 1, 1988). That case involves the same critical public safety concerns raised here, but presents distinct legal issues regarding implementation of drug use testing by a private employer in the context of a collective bargaining relationship.

[5] The FRA began its study of alcohol use by railroad employees in 1975. *See* 48 Fed. Reg. 30,723, 30,724 (July 5, 1983). After developing recommendations for action by the railroads, the FRA determined that such steps, while useful, could not solve the problem alone. *Id.*, at 30,725, 30,731. The notice and comment proceeding which culminated in promulgation of the regulations at issue lasted over two years, and involved extensive hearings and industry-wide participation. The FRA considered all comments and, in response, made numerous significant revisions in the regulations it had initially proposed.

[6] FRA concluded from its investigation that:

> the documented problem is serious enough to mandate action. Based on an intensive review of FRA and NTSB [National Transportation Safety Board] accident reports and reports filed by the railroads with FRA, FRA has identified 34 fatalities, 66 injuries and over $28 million in property damages (in 1983 dollars) that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983.

49 Fed. Reg. 24,252, 24,254.

believed that available statistics substantially understated the extent of the problem; autopsies, although performed only intermittently, showed a far greater incidence of alcohol and drug ingestion by railroad personnel killed in workplace accidents than would otherwise have been suspected, and FRA and NTSB investigate only a small percentage of all train accidents. 49 Fed. Reg. 24,252, 24,265 (June 12, 1984).

Although the problem obviously required FRA attention, no easy solution presented itself. The FRA's research revealed that employees who imbibe low[7] to moderate amounts of alcohol most frequently do not exhibit any easily detectable signs of impaired performance. In addition, "alcoholics and other habituated drinkers may be able to achieve elevated [blood alcohol content levels] (even in excess of .30 percent) without showing outward signs that would be evident to a person with limited training." 50 Fed. Reg. at 31,526 (August 2, 1985).[8]

[7] Alcohol, even in lesser amounts, is known to affect "choice reaction time" (i.e., human response time in "divided attention situations of the kind experienced by operators of transportation vehicles"). 50 Fed. Reg. 31,508, 31,536. Small quantities of alcohol are also thought to increase by more than five times the likelihood that train operators will be lulled to sleep by the rhythmic rocking of the cars during long, routine night trips. *Id.*

[8] The FRA noted research indicating that social drinkers, bartenders, and even some police officers cannot accurately judge levels of alcohol intoxication. 50 Fed. Reg. at 31,526 (citing Langenbucher, J.S. and Nathan, P.E., *Psychology, Public Policy and Evidence for Alcohol Intoxication*, American Psychologist, 38[10]: 1070-1077, 1983). The FRA further noted that "many emergency rooms rou-

Detection of drug-related impairment is even more difficult: "[m]any drugs of abuse produce effects much more subtle or complex (and sometimes more pernicious) than alcohol." 50 Fed. Reg. at 31,527.

Because it would achieve the agency's desired objectives of insuring public safety by (1) increasing industry awareness of the correlation between accidents and alcohol or drug use, (2) deterring on-the-job substance abuse, and (3) obtaining needed information on which to base further regulatory efforts, *see*, *e.g.*, 50 Fed. Reg. at 31,540, the FRA ultimately concluded that an alcohol and drug testing program covering a limited number of railroad employees actually responsible for the movement of rail traffic would be the most effective first step. The regulations, applying almost exclusively to those railroad employees whom Congress determined in the Hours of Service Act to be performing service connected with the movement of trains, *see* 49 C.F.R. § 219.3(d), (e), were promulgated on August 2, 1985.

Part C of the regulations mandates prompt testing (by medical analysis of blood and urine samples) of railroad employees involved in any of the following: (i) any train accident resulting in a fatality, a release of a hazardous material accompanied by an evacuation or a reportable injury, or damage to railroad property of $500,000 or more; (ii) a collision resulting in a reportable injury or damage to railroad property of $50,000 or more; or (iii) a "train incident that involves a fatality to any on-duty railroad employee." 49 C.F.R. § 219.201(a).

Part D of the regulations permits, but does not require, prompt testing (by analysis of urine and breath samples) of (i) all employees involved in reportable accidents or incidents who are reasonably suspected by

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tinely test blood samples for ethanol precisely because they can miss even high blood alcohol levels during triage." 50 Fed. Reg. at 31,526.

supervisors to have contributed to the cause or severity of those accidents or incidents; and (ii) all employees directly involved in specific human error[9] operating rule violations. 49 C.F.R. § 219.301.[10]

Noting that it had "no jurisdiction to terminate employment relationships," 50 Fed. Reg. at 31,546, the FRA generally left the disciplinary consequences of positive test results to be settled by the employing railroad. It imposed as the only *federal* sanction a requirement that employees refusing to provide blood and urine samples under the mandatory (Part C) testing program be disqualified for nine months from Hours of Service work. 49 C.F.R. § 219.213. The agency expressly forbade physical coercion or "any other deprivation of liberty." 49 C.F.R. § 219.11(e). Railroad employees employed on and after February 10, 1986 were "deemed to have consented to" the testing program. 49 C.F.R. § 219.11(a).

The Railway Labor Executives' Association and certain labor organizations brought this action to enjoin the FRA's drug testing program, relying on, in relevant part, the Fourth Amendment.

The Proceedings Below

The District Court for the Northern District of California upheld the constitutionality of the challenged regulations, stating that "there are no factual issues." The

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[9] The FRA notice announcing promulgation of the regulations describes in layman's terms the operating violations that are covered, and explains that each of these particular violations is "an objective event and a clear indication of a material deviation from safe practice suggesting the real possibility that the employee is not fit." 50 Fed. Reg. at 31,553.

[10] Part D also permits testing of employees whom supervisors reasonably believe, on the basis of personal observation, to be under the influence of alcohol or drugs. 49 C.F.R. § 219.301(b)(1), (c)(2). The court below upheld these provisions, and they are not further discussed here.

court noted that the regulations serve compelling governmental purposes:

> The government certainly has a valid public and governmental interest in the promotion of safety and railway safety, safety for employees, and safety for the general public that is involved with the transportation. It's also obvious from the length of time and the detail in which the regulations have gone that the government has made a sincere attempt to gath[er] together information and do some balancing of interests on its own.

Appendix B to Petition, at 52a.

A divided panel of the Court of Appeals for the Ninth Circuit reversed, and the Secretary of Transportation seeks review here.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN IMPORTANT FEDERAL INITIATIVE IN A TOTALLY UNSETTLED AREA OF THE LAW.

A. The Importance of the Case.

Few would contend that the risk to public safety posed by railroad employees who consume alcohol or drugs while operating trains is one society should tolerate. Every train is an instrumentality of potentially massive destructive power, not only from collisions, but by reason of the nature of the cargo carried, such as toxic chemicals or other hazardous materials. Recent history has shown that some railroad employees undertake operational responsibilities with judgment or senses clouded by alcohol or drugs, thus endangering not only themselves, but the lives and property of fellow employees, rail passengers, motorists, railroad companies, and abutting communities. In the interests of public safety, such employees should be identified and their problems confronted.

Because of the compelling public interest in implementing the FRA's carefully-conceived program to address this need, a grant of the petition is badly needed so that the constitutional problems involved can be fully considered and resolved on a national basis. A refusal by the Court to hear this case will permit the decision below to stand as a bar to institution of governmental alcohol and drug testing programs in other industries—e.g., aviation, trucking, nuclear power, air traffic control—in which substance abuse by employees might well have equally lethal consequences.

B. The Conflicting Decisions in Lower Courts.

The decision below likewise merits review here because of the conflict-ridden state of the decisions in lower courts concerning the constitutionality of alcohol and drug testing. The decision below and others hold "individualized suspicion" to be an absolute prerequisite to such testing, *see, e.g., Capua v. Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); but other courts have upheld random or mass testing of employees. *See Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).[11] Still other decisions mandate individualized suspicion on their facts, while suggesting the possibility that governmental formulation of a generalized policy regarding candidates for tests might be sufficient to satisfy the Fourth Amendment. *Amalgamated Transit Union v. Sunline Transit Agency*, 663 F. Supp. 1560, 1568 n.4 (C.D. Cal. 1987); *Feliciano v. Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987); *Lovvorn v. Chattanooga*, 647 F. Supp. 875, 883 (E.D. Tenn. 1986). Also notable is a case with facts almost identical to the present case, where post-accident

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[11] Indeed, the *Shoemaker* court, in a decision directly inconsistent with the opinion later rendered in this case by the Court below, held that the "administrative search" doctrine applies in highly regulated industries to permit *drug testing of employees* (and not just searches of business premises) without requiring either individualized suspicion or procurement of warrants.

testing *was held valid. Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976) (because of a transit authority's "paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs," transit workers "can have no reasonable expectation of privacy with regard to submitting to blood and urine tests"), *cert. denied*, 429 U.S. 1029 (1976). These conflicts demonstrate that the district and appellate courts badly need guidance from this Court in working out the constitutional implications of alcohol and drug testing.

II. THIS COURT'S GRANT OF CERTIORARI IN *NATIONAL TREASURY EMPLOYEES v. VON RAAB*, No. 86-1879, WILL NOT RESOLVE THE ISSUES RAISED BY THE PETITION.

Although the *Von Raab* case now awaiting hearing by this Court involves the constitutionality of employee drug testing, that case does not raise the important issues which are at the heart of the present petition. This case involves three critical factors not present in *Von Raab*: a compelling government interest in public safety; a cause requirement embedded in objective regulatory standards; and testing of employees, rather than job applicants only.

Von Raab upheld Customs Service regulations that require urine testing of applicants for employment in positions involving either interdiction of illicit drugs, carrying of firearms, or access to classified information. The purpose of the regulations—safeguarding the integrity of, and public confidence in, an agency having daily contact with criminals and illicit drugs—is primarily important to the law enforcement community. The FRA's regulations, in contrast, serve to protect the public from the imminent threat to safety known to be posed by train operators who are under the influence of alcohol or drugs. These compelling interests of public safety are shared by every common carrier, and by public utilities, certain

allied industries, and other governmental departments as well. The present case, if heard by the Court, will provide concrete guidance regarding the reasonableness under the Fourth Amendment of public-safety based alcohol and drug testing programs. *Von Raab* does not involve public safety, and it will provide no such guidance. A decision in the *Von Raab* case, followed by a summary reversal and remand of this case, would be of little help in applying the Fourth Amendment balancing test here. The question would still have to be decided here eventually, and, in the public interest, and in the interest of judicial economy, it should be decided presently and in this case.

In *Von Raab*, the Customs Service expressly denied that any drug abuse existed among its employees, historically or currently. *Von Raab* thus involves administration of tests without any reason to suspect that the results may be positive. Whatever the merits of such a program, the FRA regulations are quite different. The FRA regulations contain an implied "cause" requirement: employees are only tested following involvement in serious accidents or rule violations which, based on experience, the FRA has determined to be either difficult to investigate, or historically attributable to operator error. *See, e.g.*, 50 Fed. Reg. at 31,542. In the context of the FRA's findings that an alcohol and drug problem exists in the railroad industry, and that this problem has caused a significant number of serious accidents, the FRA's standards express sufficient grounds for a constitutionally adequate suspicion that the employees tested will be found to have been under the influence of alcohol or drugs. This implicit cause determination—not present in the *Von Raab case*—satisfies the Fourth Amendment's "reasonableness" requirement. *Von Raab* will not advise lower courts regarding the sufficiency of cause requirements imposed through objective administrative standards; nor will it illuminate the relevance of this Court's precedents to such a concept.

Finally, *Von Raab* involves testing of job applicants, while this case involves testing of current employees. Lower courts—indeed the *Von Raab* court itself—consider this distinction to be significant for Fourth Amendment purposes. *See, e.g., National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987); *Capua v. Plainfield*, 643 F. Supp. at 1519. To the extent that courts would still be left without guidance in determining whether the privacy expectations of applicants for employment are different from those of employees, *Von Raab* will not resolve this case.

Though this case is in the same area as *Von Raab*, the issues involved are quite different. The questions involved here are of great importance, and merit a decision by this Court which is specifically applicable to this case.

III. THE FRA'S REGULATIONS ESTABLISH SUFFICIENT CAUSE TO SATISFY THE FOURTH AMENDMENT'S "REASONABLENESS" REQUIREMENT.

A. The Regulations Sharply Limit Any Exercise of Discretion by Railroad Personnel Who Implement the Testing Program.

The FRA's regulations are carefully drawn to protect Fourth Amendment interests. Searches are only permitted where events occur which justify a reasonable supposition of human error that may have been caused by alcohol or drug impairment[12]—thus bringing into

[12] Note that the FRA expressly excluded from its description of such events rail/highway grade crossing collisions. 49 C.F.R. § 219.201(b). The agency observed that in most cases, such collisions are not caused by errors on the part of railroad personnel. *See* 50 Fed. Reg. at 31,543.

play the regulatory findings that a significant number of railroad accidents are alcohol or drug-related.[13]

The FRA has carefully defined these events in almost totally objective terms: practically the *only* discretion railroads have in designating employees for testing under the standards is determining whether property damage is extensive enough to meet the criteria. Even as to the latter point, the regulations explicitly require that a "good faith" estimate be made, 49 C.F.R. § 219.203(c), and—recognizing that railroad personnel are the only persons available at the scene to implement the testing program—specify that such estimates pertain only to damage to railroad property. *See* 49 C.F.R. § 219.201 (a)(1)(iii), (a)(2)(ii). Railroads failing to comply with any part of the regulations are subject to civil penalties. 49 C.F.R. § 219.9.

[13] *Compare Delaware v. Prouse*, 440 U.S. 648, 659 (1979):

> The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained.

Compare also United States v. Mendenhall, 446 U.S. 544, 565 (1980) (Powell, J., concurring) (drug courier profile, applied by experienced officer, was a "well-planned, and effective, Federal law enforcement program" satisfying "reasonable and articulable suspicion of criminal activity" standard).

Moreover, since the regulations require testing of employees based on involvement in serious accidents which the FRA has determined to be of great public interest and difficult to investigate, the need to preserve evidence for the safety investigation is an "exigent circumstance" justifying the testing under the Fourth Amendment's "reasonableness" requirement. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1977).

B. The Regulations Are Tailored to Avoid Any Undue Intrusions Upon Privacy.

The regulations require that all blood and urine samples be collected at independent medical facilities by medical personnel or technicians. 49 C.F.R. §§ 219.203(c), 219.305(a). They do not authorize that samples be tested for any characteristic other than alcohol and drug use, nor do they authorize release to railroads of medical information (other than the presence in body fluids of alcohol or drugs or their metabolites) derived from the tests. Except for an implied requirement that the tests be administered in such a way as to provide reliable results, the regulations do not sanction intrusions upon employee privacy during collection of urine samples. They expressly prohibit forced administration of tests. The regulations require that employees refusing to undergo Part C testing be disqualified for nine months from Hours of Service functions, but otherwise leave disciplinary decisions to the railroads. The latter decisions will be made in the context of the procedures and requirements which Congress and the courts have deemed appropriate to protect the employment interests of railroad labor.

In these circumstances, the privacy interests of tested employees are not impaired in a constitutional sense. Case law considering whether "consent" to a search conducted by law enforcement personnel is voluntary and non-coerced has no application to the only governmental intrusion here—the requirement that employees, who are under no physical compulsion, decide whether they will provide blood, urine, or breath samples, or whether they would rather be disqualified from service for nine months and undergo such further disciplinary proceedings as their employers may deem necessary and not inconsistent with legal obligations. *Compare Wyman v. James*, 400 U.S. 309, 317 (1971) (where visitation by

social worker "in itself is not forced or compelled, [and] the beneficiary's denial of permission is not a criminal act," no Fourth Amendment search occurs, despite the fact that the visit may have "both rehabilitative and investigative" purposes, and that benefits cease upon refusal to permit the visit). Nor do the regulations implicate privacy interests in the "personal information contained in body fluids," since the only "personal information" divulged is alcohol and drug use—information in which, for purposes of safety investigations, employees have no reasonable expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1983). *See also United States v. Villamonte-Marquez*, 462 U.S. 579, 591-92 (1983).[14]

C. Cause Requirements Incorporated Into the Regulations Satisfy the Fourth Amendment in the Circumstances of This Case.

The FRA's objectively-expressed cause requirement is fully consistent with the spirit and the letter of the Fourth Amendment. The regulations fit easily within the guidance of this Court's "administrative search" cases. Such cases hold that warrantless searches, unsupported by traditional probable cause determinations, of premises of heavily regulated businesses are reasonable when performed without force and pursuant to appropriate standards. *See New York v. Burger*, 107 S. Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). These cases, which emphasize the need for warrantless searches in order to meet the reasonable needs of public concern, turn on the fact that proprietors in such indus-

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[14] Note that most, if not all, railroads have for years enforced "Rule G," an industry safety rule which prohibits railroad employees from using alcohol or narcotics while on duty, from possessing these substances while on company property, and from reporting for duty while under the influence of alcohol or drugs.

tries are aware of the extensive regulation to which they are subject and accordingly have no reasonable expectation of privacy.

Under these cases, the doctrine applies, despite the absence of individualized suspicion, where (1) "there [is] a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) warrantless inspections are necessary to the regulatory scheme; and (3) the inspection program "in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant" (i.e., the regulations must advise that the search is being made pursuant to the law and in accordance with a properly defined scope, and must limit the discretion of the inspecting officers). *New York v. Burger*, 107 S.Ct. at 2644.[15]

Railroads, and their predecessors, were among the first modes of transportation to be extensively regulated. Although in recent years railroads have experienced some rate deregulation, governmental scrutiny remains close, particularly with respect to two areas that are vital in the present context: labor (*see, e.g.*, the Railway Labor Act, codified as amended at 45 U.S.C. § 151 *et seq.*), and safety (*see, e.g.*, the Federal Railroad Safety Act, codified as amended at 45 U.S.C. § 431 *et seq.*). Thus, railroads are "heavily regulated businesses" and well within the scope of the cases cited above.[16] The railroad em-

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[15] The *Burger* opinion notes that "an expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." 107 S. Ct. at 2674. The testing authorized here is administered to individuals in their status as "employees," not in their status as private citizens.

[16] The Court of Appeals held that while railroads are heavily regulated, railroad employees are not, noting that employees are not licensed. This distinction has no sound foundation. The penalties and burdens of the administrative schemes in the heavily regulated business cases ultimately fall on individuals, not companies. The fact that the FRA did not create a licensing procedure for employees is irrelevant; it would be incongruous if the FRA could constitutionally adopt a program for determining eligibility for employment, but could not validly require the lesser intrusions occasioned here.

Moreover, as noted below, railroad employees are well aware of the regulatory scheme to which they are subject. Even more important, railroad employees *are* heavily regulated. *See, e.g.*, 49 C.F.R. Parts 217 (requiring instruction of employees on operating rules and periodic testing of rule compliance); 218 (prescribing minimum safety requirements for railroad operating rules and practices—rules and practices which for the most part must be actually implemented entirely by employees); 219, Subpart F (requiring preemployment drug testing of applicants for positions involving operation of trains); and 220 (establishing minimum requirements governing employees' use of radio communications in connection with railroad operations).

ployees subject to the FRA's regulations here know the nature and importance of their jobs, and are well aware of the provisions of the regulations.[17] Union representatives participated extensively in the notice and comment proceeding, meetings have been held to explain the regulations to affected employees, Part C testing has been heavily featured in news stories since then in connection with rail disasters, and employers administering Part D testing are required to give employees detailed notice of the provisions of that Part. *See* 49 C.F.R. § 219.309(b). As noted above, the regulations severely limit the discretion of the persons who must implement the testing program. Finally, testing must be done promptly after the accident, if it is to serve its best purpose,[18] and given the

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[17] The regulations as promulgated gave employees several months' notice that the testing program would be implemented, and that their consent to testing would be a condition of employment. The Third Circuit in *Shoemaker* found an analogous prior notice and consent provision to be a significant factor favoring application of the "administrative search" doctrine to drug testing of jockeys.

[18] The FRA noted during the rulemaking proceeding the "difficulty associated with estimating previous alcohol and drug levels from specimens obtained some time later." 50 Fed. Reg. at 31,554. Part C tests are to be administered "as soon as possible after the

time constraints, confusion following the accident, and lack of familiarity of railroad personnel with the court systems in the many locations where accidents may occur, a warrant requirement is neither realistic nor feasible, nor really useful in protecting Fourth Amendment values. The administrative search cases justify the FRA's regulations.[19]

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition, the writ of certiorari should be granted, and the case set down for separate argument.

Respectfully submitted,

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accident or incident." 49 C.F.R. § 219.203(b)(1). Part D tests must be administered within 8 hours. 49 C.F.R. § 219.301(f).

[19] It is irrelevant for present purposes that a drug test could reveal illegal activity on the part of employees. The purpose of these regulations is civil, not criminal, as the FRA's comments during the rulemaking reveal. FRA does not require that results be shared with law enforcement authorities; indeed, FRA states that "it is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation" except under a subpoena or order. 49 C.F.R. § 219.301. *Compare New York v. Burger*, 107 S. Ct. at 2649-2652.